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IN THE

Supreme Court Of The United States

October term, 1994

WISTING FIERRO RUIZ,
OLGA L. MARTINEZ,
Petitioners'

vs.

UNITED STATES OF AMERICA,
Respondent

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Fifth Circuit Court of Appeals willfully and Knowingly misinterpretation of the could record, acknowledged that evidence drug ledgers obtained from a coffee table listed not names, haven't finger prints, haven't handwriting identifications, was objected at trial and appeal stages and reflects speculative transactions between unknown persons and was upheld as coconspirator statements in adoptive admission?

II. Does the Fifth Circuit Court Appeal's miscarriage of justice when held a document namely phone record receipt-standing alone as identification and phone conversations under Rules 901 (b) (6), (5) and 801 (d) (2) (E) ?

III. Does the prosecutor improper prosecutorial misconduct and improper comments against the legality of evidence admitted by a district court and against the defense lawyers professionally and credibility which improper attack the dignity of stating a theory of defense?

IV. Does the Fifth Circuit Court of Appeals miscarriage of justice and violation due of process when upheld the leader role ship against petitioner Fierro on materially untrue predicate and contrary to the record in abdication of powers?

V. Does the Fifth Circuit Court of Appeals a adoptive admission against the petitioners' through Ibanes co-defendant car's and outstrip their desecration in allowing as coconspirator statement the address book record from the Ibanes car notwithstanding that was with transaction dated before the conspiracy alleged? Does the Circuit violation of due process, violation of equal protection clause, violation of access to courts and violation of Sixth Amendment when withdraw the petitioner lawyers without petitioner consent?

PARTIES TO THE PROCEEDING AND REQUEST

The parties to the proceeding are the petitioner's: Wisting Fierro Ruiz and his Law Common wife's Olga L. Martinez, and the United States of America, the respondent.

Petitioner are layman at law acting prose, actually incarcerated and respectfully request this Honorable Court that the petitioner be both afforded the protections of law as provided to prose, litigants under the Principle of HINES V. KERNER, 404 U.S. 519, 30 L.Ed. 2d 552, 92 Sct 594 (1972).

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Petition For Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioners': WISTING FIERRO RUIZ AND OLGA L. MARTINEZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit refusing to declare inadmissible a disorganized paper's namely exhibit 43 and 43A seized under a search warrant of a jointly occupancy residence, like the error allowing a phone record receipt as admissible to published the content and identities without limit notwithstanding that was introduced by a person without personal knowledge under the calls and speaker identifies an the Fire's leadership role which was based in outstanding charges on the Texas State actually dismissed, petitioner challenge also the quaintly drugs and the denial Assistance counsel when counsel when Court withdraw appeal counsel without petitioner request,

consent and approval. Like drugs and improper comments fromthe prosecutor against evidence admitted in petitioners' behalf through devastating comments.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States v. Fierro et. al, 38 F.3d 761 (5th Cir. 1994), and appears in Appendix A to this petition. The outstanding charges of the Texas States actually dismiss appears in Appendix B. And the record's under the unreliable role leader appears in Appendix C.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on November 11, 1994. A timely petition for Rehearing was filed on November 20, 1994. The Court of Appeals' instructed the petitioners' to file motion to leave disposition in excess pages and after denied the motion. Petitioner unsuccessfully attempted during three times to seeking out of time files of rehearing and without addressed the merits of the contentions denial of any reviewing was issued on January 20, 1995 and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. & 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitutional provides in pertinent part;

> ** ** ..... That no person shall be deprived of life, liberty or property without due process of law..."

The Sixth Amendment of the Constitution of the United States provides in pertinent part;

> ** ** ..... The right to effective assistance of counsel and compulsory process, confrontation witness....."

The Fourth Amendment of the constitution provides impertinent part; ... rights of the people to be secure in their person..."

STATEMENT OF THE CASE

On January 8, 1992 superseding indictment was returned against petitioners' Fierro and Martinez with Conspiracy to posses cocaine with intent to distribute, 21 U.S.C. && 841(a)(1) 841 (b)(l)(A), 846. Count 2 with aiding/abetting possession of cocaine, 18 U.S.C. & 2 and Conspiracy to commit money laundering 18 U.S.C. & 371, 1956 (a)(l)(A)(l) On April 24, 1992, after a ll-day trial, the jury convicted petitioners'. The district Court for the Southern District of Texas-Houston-Division sentenced petitioners as follows: Fierro's received 293 months each count 1 and 2, and 60 months on Count 3. Martinez received 121 months each counts 1 and 2, and 60 months Count 3., petitioners' both received a $ 150 assessment of mandatory costs and two five years terms of supervised release on Counts 1 and 2, and three years of supervised release on Count 3 to be served concurrently.

Petitioners' argued through jointly original brief and Supplemental Prose brief before the Court of Appeals for the Fifth Circuit that the admission of a drug ledger document found under the cottee table house where Fierro, Martinez and other persons lived was inadmissible together with two more documents seized from Ibanez's Codefendant car and under the sofa cushions of the jointly occupancy residence. On French Road house lived petitioners together with Ibanez, Isabel Sanchez Rojas, Luis Mendoza, Luis Mendoca. In Supplemental Prose both petitioners argued that the phone record receipt standing alone cannot identified the parties identity and phone conversations pursuant Rules 901 (B)(6),(5) and 801 (D) (2) (E). Supplemental prose argue that improper comments was committed from prosecutor against the crucial evidence of petitioners defense and that the Fierro leadership is materially contrary to the entire record.

The Fifth Circuit found that the document's under the coffee table wasn't hearsay, that the identification of the declaring wasn't necessary for the admission and contrary to the record opined that the drug ledger found on the coffee table have 95 separates places prints from Fierro and 23 separate places from Martinez. Also found that the Address book in the Ibanez car is adoptive admission because have petitioners' prints place in five and two places. The Circuit found that the evidence phone records and other profiles evidences was other involvement in the cocaine conspiracy, including Fierro and Martinez "profiles" connections and activities with the other defendants'. Also to Circuit found that the evidence "government argued that Fierro was the organizer/leader of cocaine operation" and that apparently used to Martinez and Ibanez as courier was sufficient to upheld

the leader rolship contrary to the record.

The Fifth Circuit is silent in the process contentions under the improper comments and under the phone record document's and rejected and attempt from the petitioner to file rehearing to calls the attention under this issues which compromised the public reputation of and judicial systems. See U.S. V. FIERRO 38 F3d at 767- 775.

It is hard to discern Fifth Circuit motive for misconstruction of the could record, it is harder to imagine under that doctrine the Fifth Circuit violated the equal protection and access to court to the petitioners', the Circuit deprive in any sense and rationality the consideration fundamentals issues, furthermore the Circuit on February 23, 1994 withdraw as retained counsel the petitioners counsel (See Appendix E), without petitioner consent" (Appendix E), without petitioner consent" (Appendix F).

The Circuit without stippled reasons rejected and do not filed the petitioner Reply Brief to the Government Brief. Also denied motion in limine against misconstruction of the record issues in the government Brief and when opinion was submitted for the panel the circuit denied the disposition of the petition by rehearing panel filed because excess of pages was present notwithstanding that on December, 1994 the petitioners' were instructed to submitted motion the circuit through informal piece of paper without signature on January 5, 1995 returned the petitioner brief (Appendix g and H). Petitioner newly submitted motion for three Judge consideration and the motion was denied without opinion under the merits on January 20, 1995. Petitioner wrote to Justice Rehnquist soliciting your intervention but was rejected and not assisted (Appendix I).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: First, this petition presents an issue resolved by implication by this Court but not specifically and unequivocally decided by this Court in UNITED STATES V. ORDO NEZ, 737 F. 2d 793, 802 (9th Cir 1984) and UNITED STATES V. MOUZIN 785 F.2d 682 (9th Cir, 1986) both with cert. denied, then upheld for this Court.

This Count has implicitly held that when the statement otherwise satisfy the requirements of Rule 801 (d) (2) (E) that the statements be made in the course and in furtherance of the conspiracy the confrontation clauses doesn't require the prosecution to show that a non testifying coconspirator is unavailable to testify, as a condition for admission of that conspirator out-of-court statements, although "the reliability of the out-of-court statements"

wasn't at issue this Court held that:

> **'The court in ordonez found a Confrontation Clause violation because the Government, after introducing drug ledgers containing entries made by unidentified co-conspirator, didn't adequately demonstrate that it was totally unable to identify those conspirator". Inadi 475 U.S. at 401 n. 13.**

Here the Fifth Circuit found as admissible and without violation Confrontation Clause the coffee table "ledgers" or exhibits' 43, 43A, objected at trial and appeal stage for petitioners' and noticing the panel against misinterpretations against the could record from the Government Brief in clear abdication their duties and power's and failed to independent reviewed under the record.

The record showing that this figures or drug ledgers of the coffee table **HAVEN'T PETITIONER FINGERPRINTS NOR ANY PRINTS** identified for the F.B.I. Prints expert (t 4: 96-108). the F.B.I. expert in ledgers contrary to the panel opinion under this specific document clearly express:

> **"The analysis of that document it's not complete as where the money is added up or where the Monies came from . . . I cannot from looking at this document, I cannot tell you exactly where those Monies came from" (T 4: 144-155).**

The document's or drug ledgers from coffee table **LISTED NOT NAMES, HAVEN'T PETITIONER HANDWRITING, HAVEN'T PETITIONER'S POSSESSION AND THE PLACE OS JOINTLY OCCUPANCY PLACE, THE DOCUMENT IS UNDATED,** and the expert in ledgers stated:

> **" I unknown how recent it document was. . . if it document was just plain undated it was not in any kind of sequence" (T 4: 149-151).**

During the petitioners' lawyer cross-examination the expert clearly stippled;

> **"I couldn't make a positive determination that this undated document correlate with the dated documents" Id.**

The expert in ledgers couldn't determine if this hearsay figures without phrase representing 30 kg of mixture, marijuana, heroin or any other controlled substance, the documents nor any other document have not handwriting identification and the expert in ledgers said under the handwriting that:

> **'[I]ts the responsibility of the people in the F.B.I. handwriting section of the documents to determine who actually wrote it"**

The document was found in plain view and the residence was unlocked when the surveillance made the enter, the government argued that referred to 30 Kg cocaine purchasing from Fierro's to Grajales codefendant's, the government offered not evidence under the transaction nor the minimal inference, the government failed to authenticate properly the ledger, it was inadmissible hearsay. Government presented not "ample evidence" as required for the proprio Circuit in Arce, 997 F2d at 1128, in the authentication not the handwriting. Not witness testified that petitioners' sold or buyer this cocaine, the ledger is absent of custodian and was introduced for the truth of the matter asserted to showing that:

> **[h]ow about Fierro... he's also got his fingerprints all over the drug records that were seized" (T: 9: 136-139).**

A reasonable jury and an reasonable panel couldn't held that petitioners' were connected with each other in this transaction, the panel finding is a total miscarriage of justice and is adoptive admission of what its content reveals, the preponderance standard established not that the "unknown declaring" and the petitioners' were involved in the conspiracy proved not that was made in furtherance. More the documents were all admitted without requisite finding at the close of the case required for the proprio Circuit in JAMES, 590 f.2d 575 (5th Cir 1981) and the proprio Circuit in Megenson teaches that the petitioner are not responsible of this 30 kg. MEERGENSON 4 F. 3D 337 (5th Cir 1993) (" held cryptic notations found on piece or paper found in drug conspiracy defendant's apartment were insufficient to establish that defendant actually possessed or conspired to possess')..

Furthermore the error isn't harmless in as mush as the prosecutor in misconduct argued in the rebuttal that:

> **"You know the handwriting expert... you don't need a handwriting expert to evaluate some handwriting" (T 10: 39) (T 10: 40).**

The coffee table drug ledgers was introduced in contravention with Federal Rules Evidence 702 through Balas through Balas to showing that this agent's "[k] what those exhibits 43, 43A was based upon knowledge that is what appears to be an attempt to find some latent fingerprints on this document" (t 2: 160-202).

Second: Certiorari should be granted because the Circuit found that the phone record receipt could be used for the purpose of identity. See UNITED STATES V. FIERRO, 38 F3d at 769.

Fierro's wasn't identified as one of the parties to any telephone conversation described in those document's. The absence of authentication

or identification and the existing hearsay problem where the document came into prove the showing of the participation and knowledge of both petitioners' conspiracy on October 1991, one months ago of the conspiracy proved according to government proper arguments.

Government violated petitioners' due process of law under MULLANEY V. WILBER, 421 U.S. 684 (1975) required as is that prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

Prosecutor relied in the content and identity during arguments:

"[F]ierro drives around making mobile phone calls. And what is he doing? Well, you are going to find out that he is doing is he paged to Serna over 30 times in October months" (t 1: 180)

Prosecutor did not limit the phone record, which was introduced by a person without personal knowledge under the calls and speaker identities.(T 4: 19-28), the prosecutor and the panel erred in allowing the phone record receipt to be used by the purpose of identity and published the content and identity as it appeared on the receipt to prove that Fierro in propria person with Martinez presence called to Serna codefendant on October

> **"Serna claims he first met the defendants Fierro on November 14th, two day prior to being arrested, but the phone record show that Fierro beeped him 56 times on October" (T 9: 134-135).**

But the record showing all the contrary, the record showing that:

> "From Fierro phone Miss Isabel Sanchez Rojas beeped to Serna in October and Serna was then in a town. Serna was told and he said that he couldn't return back the calls. When Serna was arrested on November the Fierro phone was disconnected, Fierro from November 12 had a new phone number which wasn't located in Serna's possession nor the government proved any calls between November 2 to 16 nor between November 13 to 15 of the conspiracy alleged. Serna identified the petitioner as MARTIN FIERRO and the surveillance admit that any suggestiveness contact between petitioners' and Serna was from November 14, 1991. (T 4: 19-28)(T 7: 45-52). See Espinoza-Saenz 862 at 538.

The evidence violates Fed, R. 901 (b)(6) and (5), since the petitioner contend his inadmissibility in their Supplemental prose Brief without panel attention. See Supplemental prose brief filed in Court Appeals pages and 10.

The Fifth circuit opinion creates a conflict between the Circuits because all Circuit's have been found that a phone record isn't means of introducing into evidence the identity nor the content of a phone conversation. See U.S. V. PUERTA-RESTREPO, 814 F.2d 1236 (7th Cir 1987). U.S. V. ADDONIZIO, 451 F.2d 49, 72 (9th Cir)Cert. denied 405 U.S. 936., furthermore the Circuit is in clear overturn of U.S. V. POOL, 660 F.2d 1236 (5th Cir 1981). Since these is plain error to allow the identities to be used as it was in the arguments prosecutorial, the identity constitute a statement namely **"FIERRO'S IN PROPRIA PERSON CALLED TO SERNA 56 TIMES IN THE OCTOBER MONTH" see U.S. V. FIERRO, 38 F.3d at 769.** The Circuit upheld the prosecutor errors in finding that the document evidence Fierro's connection with the Prestwood "stash house" as evidence of knowledge and participation in the conspiracy in clear miscarriage of justice inasmuch as the prosecutor arguments stated that:

> **" [Fierro calls Serna] during the month of October, the sane time period that the records will show-and these are the records that were found in the Prestwood ledgers... over a million dollars was counted in October, that s the sane period that Fierro making all these phone calls to Serna" (T 9: 136-137).**

Petitioners' had not anyone relation with the Prestwood ledgers nor with the 'stash house' as the proprio government concedes, then the prosecutor convince the jurors in the truth of the matter asserted that Fierro phone calls to Serna were in connection with Prestwood drug ledgers as knowledge and participation of the conspiracy in October, it is impermissible permit that jurors relies these statement as evidence of knowledge and participation. See U.S. V. WATKINS, 519 F.2d 294 (D.C.)(" **held rent receipt inadmissible hearsay to prove defendant paid rent");** U.S. V. JEFFERSON, 925 F.2d 1242 (lOth Cir)**("held bill for pager inadmissible hearsay when offered to prove defendant had bought pager");** FEDERAL DEPOSITS V. ROLDAN FONSECA, 795 F.2d 1102 (1st Cir **1986)("held receipt for money inadmissible** hearsay **to proved mortgage payment").**

This was and is complete miscarriage of justice the phone record

contract was prepared by another employee who was provided of the information in double hearsays. More the government **had offered nothing to identify the parties to the communication, all prosecutor did was put on a witness a document to confirm that the record reflects 56 calls between unknown parties and absent overheard, prosecutor offered nothing to prove that the communication was related to conspiracy and the argument indicate that the evidence was directly he proved the truth of the matter asserted.** The more grave is that the Circuit admissibility of the phone record documents as **"caller identification"** violated the principles of NEIL V. BIGGERS, 409 U.S. 188 (1972) and MANSION V. BRATHWAITE 432 U.S. 98 (1977) which applied from this Court mandates to a constitutional test to determine whether the identification was unreliable.

THIRD: Certiorari should be granted because the Circuit in plain abdication power's is silent under the **manipulation** of the **dramatic evidence** namely Isabel Sanchez Rojas which was the substance of the petitioners' defense at trial. (T 8: 55-69), the prosecutor instructed the jurors at no consider the evidence admitted from the district court on overruled of a government objection to the admission (T 7;8--~78), the prosecutor improper comments stated:

> " **Isabel Sanchez Rojas [document admitted by the court] isn't in evidence that You're not suppose to consider that nothing to do with this case"** (& 10: **38)**

Furthermore the prosecutor in disrespect with their colleagues stated:

> **This one document [admitted by the court] that was brought over [by the accused lawyers'] <u>is a phony document</u>"** (T 9: 129).

Prosecutor committed foul blows against the petitioner's Martinez's with a devastating comments:

> **'We submit, members of the jury that Isabel Sanchez Rojas is another alias that Martinez used"** (T 9: 129).

Since the petitioners' contend under this issues in the Supplemental Brief prose filed (pages 29, 33 and 34).

The grave under this matter is that the prosecutor through Wong the agent case and seizant agent at the French Road house aborted the entire proceeding when knowingly and willfulness committed false statement . Wong under oath at the Magistrate Stacy express that during the search warrant:

> **" I [Sussie Wong] swear this inventory is a true and detailed account of the person or property and taken by me on the warrant" See Appendix I.**

Wong at trial under oath express that she was **not at all** in any time to the French road residence (T 8: 87), this "artful phrasing" was with the objective of the denied disclosure of the Isabel Sanchez Rojas documents. This was perjuris and false statements governmental like that **prior inconsistent statement,** and is a pathetic violation of MILLER V. PATE 386 U.S. 1, 17 L. Ed.2d 690 (1967), furthermore the damage is irreparable and the error is not harmless in the fact that the District Court instructed the jurors that:

> **" [y]ou must consider only evidence presented to trial including the [false and prior inconsistent statements of Wong] sworn testimony of the witness" (T 10: 45)**

Prosecutor actions also violated NAPUE V. ILLINOIS, 360 U.S. 264, 269. because the prosecutor actions in the seizant officer is fairly characterized as knowing use of false statement and violate due process. See SCHNEIDER V. STELLE, 552 F.2d 593, 595 (5th Cir 1977).

Whether Wong wasn't the seizant officer it is clear that all the fruits of the seizures warrant is void and are inadmissible because suppression is appropriate if the "officer were dishonest" . FRANKS V. DELAWARE, 438 U.S. 154 (1978). See Supplemental prose pages 1 to 4.

FOURTH: Certiorari should be granted because the district Court and Appeals Court's interpretation of the requirement Leader Roleship under the petitioner Fierro's was based on **MATERIALLY UNTRUE PREDICATE, CONTRARY AT THE RECORD AND FOR GOVERNMENT RECOMMENDATION.** The district court was unable to consider the petitioner leader roleship absent a outstanding charges of the Texas state's

actually dismissed (Apendixes B, C), the state charges were not related in any via to the actual offense and the judge interpretation of the requirement stated:

> "... **If, Fierro were in category three, if has been found guilty of the state charges, he would be in 235 to 293 months with 36 and with the leader rolship a 38 in category one it's 235 or 293 ... that would be about the same". Transcripts of sentencing, page 17~ 25, 26, 27. See Original Brief pages 34.**

Furthermore the Appeal Court had knowledge that the outstanding charges were dismissed (Petitioner brief page 9), then under the statement of used for the district court (Appendix C), the petitioner sentence is violative of 18 U.S.C.A. & 3553 (b) into the sentence impose in excess of guideline range is actually invalid. Petitioner sentence is violative of the authorities CUSTIS V. UNITED STATES —, 114 Sct 1732, 128 L.Ed. 2d 517 (1994); WILLIAMS V. UNITED STATES, 112 Sct 1112, 1117, 117 L.Ed. 2d 341 (1992).

In any rate the panel found that Fierro was in leader "because the government argued it", acknowledged that the government had not established the factual predicate. Petitioner clearly objected at sentencing time with government and Judge silence that **"during the trial the surveillance testified that Serna was the leader of Fierro, Martinez and Ibanez, and I would like to show you, your honor the page of the police report, itself where the government set forth that Serna is the leader of Fierro, Martinez and Ibanez.." (Transcripts sentencing page 13).**

The government as part seeking the adjustment in the sentence level had not established accord the record the factual predicate justifying the adjustment nor have proved by a preponderance standard relevant accord to the could record anyone sufficient reliable evidence to support the adjustment:

> **" THE COURT: All right Mr. Supple, do you have anything you want to say on sentencing [in support of the enhanced rolship] ?**
>
> **"THE PROSECUTOR: NO, the GOVERNMENT is content with the error]".**

Nothing established that at the sentencing hearing the government do bears their burden of establishing that Fierro's was an organizer or leader,

the leadership enhance bear not indicia of reliability to support their probably accuracy, the factual finding and interpretation guidelines was materially untrue in violation of **TOWNSEND V. BURKE, 334 U.S. 736, 68 Sct 1252, 92 L.Ed 1690 (1948).**

The government violated with the enhanced the petitioner due process inasmuch as the government witness estipuled accord to the record that Fierro was a participant **"very attentive to the voss Mr. Serna" (Appendix C)**. More important the government failed to demonstrate that Fierro "was more culpable than others for the wrong doing-the central concern of & 3Bl.l, the district court nor the Appeal court identified anyone of the Seven factors set out in the commentary to U.S.S.G. & 3Bl.l and failed to discuss in detail Fierro's responsibility in relation to the others participants and adopted a recommendation prosecutorial under the applicable deferential standard. Some Circuits have been established that when as in the case at bar **" defendant's offense level have been increased based on his aggravating role in drug sales, absent evidence of anything other than seller-buyer relationship the enhanced is inappropriate under 3 Bl.l". See: UNITED STATES V. MAXWELL, 34 F.3d 1006 (llth 1994); U.S. V. BROWN 944 F.2d at 1382 (7th Cir. 1991).**

FIVE: Finally the certiorari should be granted because this Court must overturn the judgment in the factor that petitioner cannot be responsible under drug quantity of 30 kg of the coffee table drug ledger's as the appeal court ordered in the opinion, and furthermore the petitioners' also seeking the discharge of 12 kg cocaine found under the address book of the codefendant Ibanez car's through figures-ledgers. The Address book was introduced as evidences 37 B for the expert in drug ledgers (T 4: 144), haven't petitioner handwriting, haven't petitioner names, haven't petitioner possession, petitioner never had dominion actual or constructive under the Ibanez car's nor were seen driving the Ibanez car nor were a passenger in any time of the Ibanez car's, the court found a adoptive admission based in petitioner fingerprints found in the address book on the particular page that the expert identified as **"prints opposite to it figures 12 kgs"** (T 4: 102, 127), the exhibit 37 b, of 12 kgs haven't petitioner fingerprints in the page, the fingerprints were found in a page opposite to it.

Petitioner prints were developed in the Exhibit 37 A, and the expert in ledger express that represented one Kg of cocaine the figures.

Under the Circuit opinion the address book is an Ibanez property found in the Ibanez car, then petitioner couldn't accountable "specially when there is evidence in the record explicitly linking the contraband to another

occupant". See U.S. V. CRAIN, 33 F.3d at 486, 487 (5th Cir 1994), Furthermore the government does not prove a common plan of distribution in the buyer seller relationship alleged between Fierro-Grajales, and the 12 of the Ibanez car were purchaser according to the expert to $ 13.500 peer kilo on October 5, 1991 to a "millo" sources (T 4: 137) then clearly were **"not part of the illegal activity the petitioner joined"** with the Grajales sources on November 14, 1991 at the price of $ 12.400, then the 12 Kg were not related to the conspiracy by which petitioners' were convicted and ~re not amounts "reasonable foreseeable" to the petitioners'. The proprio Fifth Circuit have been established that **"When the book containing the entries is a personal book, ... it satisfied of it, that the owner or possessor [Mr. Ibanez] of the book made the entries in it".** DEAN V. **UNITED STATES, 246 F. 568 (5th Cir 1917).**

Furthermore assuming arguendo the authenticity, the admissibility is a separate inquiries and doesn't necessarily mean that it is admissible in evidence, the record is insufficient to permit a finding that petitioners' possessed and adopted the content of the address book, the district court did outstrip the bounds of its discretion, the ledgers is hearsay for the following factors:

> **" Was dated with October 5 without year's, then before that petitioners' joint to the conspiracy proved on November 14, 1991, the matter which the expert intends to assert was different from the matter to be proved, the expert asserted 2 prices 14.500 and 13.500 and the government matter proved accord to the Presentence Report is that petitioners' buyed cocaine to Grajales in $ 12.SOO per kilo. The admission is adoptive admission contrary to Mouzin, 782 F2d 682 (9th Cir) Cert. denied 479 U.S. 985 (1986). Petitioners' never drove the Ibanez car, the record doesn't support that the declarant were the petitioners' and is absent of competent evidence to establish the requisite relationship of the declarant and the conspiracy" Id.**

CONCLUSIONS

Petitioner's claim that their equal protection and access to court had been violated from the Court Appeals when misconstructed the could record and failed to address constitutionals issues submitted in filed Supplemental prose brief, furthermore the circuit denied the file of petitioner rehearing by panel, suggestions en Banc, motions and withdraw the Appeal lawyer's without petitioner consent.

> "The right to sue and defend in court is the alternative of for in an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship granted and protected by the federal constitution". CHAMBERS & OHIO R.R., 207 U.S. 142, 148, 28 S.ct 34, 35, 52 L.Ed. 2d 143 (1907).

The appeal court doesn't provide to this prisoner's with a regular and orderly avenue for correcting such errors, it principle wasn't conservate in this appeal and since petitioners' couldn't bypassed their opportunity to raise the claim on direct appeal for raise it after in collateral attack. For all the reasons complained the petitioner respectfully contend that the Fifth Circuit Court Appeals is serving a government interest contrary at the separation of powers and in this case was serving as a prosecutor more in the extent that had foreclosed and burdened in denied any exercise form the petitioners' rights and with presence of unreasonable alternatives misconstrued the record of the trial transcripts at the government service.

The circuit contrary at public interest closed the door against the poses litigants' and unreasonable clear-cut the substantial defense of this prisoners', then two further questions remain open form this litigants. One is whether the circuit decisions' to deny petitioners' equal protections, due process and access to court is tainted by a citizen motive of contend in prose vias after that the proprio circuit withdraw the appeal lawyer's and other is whether the circuit attitudes under the Appeal record stage presents an equal protection problems that must me addressed from this Court to evitate further situations.

For the reasons set forth above, issue to review the judgement and opinion of the Court of Appeals in this matter to evitate future abuse against prisoners unlawfully incarcerated.

Dated: February 9, 1995

Respectfully submitted under perjury
and penalties,

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PROOF OF SERVICE

We, Wisting Fierro Ruiz and Olga L. Martinez, petitioners', pursuant to supreme court rules 29.3 and 29.4. We have served the attached petition for a writ of certiorari on each party to the above proceeding, or that party's counsel, and on every other person required. Those served are as follows: United States Attorney Office's for the southern district of Texas, 515 Rusk, Houston, Texas 77002 and Solicitor General U.S.D. Justice, Main Justice Building, 10th and Const. Ave., Washington D.C. 20035.

Respectfully submitted, under perjury
and penalty
OLGA L. MARTINEZ
IN PROSE

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant

v.

Wisting R. FIERRO, Olga L. Martinez, Jaime Ibanez a/k/a Ibania, Jesus A. Serna, Defendants-Appellants

Jose J. Grajales, Defendant-Appellant, Cross-Appellee,

No. 92-2370

United States Court of Appeals,
Fifth Circuit.

Nov. 11, 1994

Defendants were convicted in the United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., of possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering. Defendants appealed and government cross-appealed. The Court of appeals, DeMoss, Circuit Judge, held that: (1) evidence supported conviction; (2) "conspiracy bus" simile which prosecutor discussed during closing arguments, stating that defendant is guilty of conspiracy if he knows of others' criminal activity and does not take affirmative steps to "get off the bus," did not deprive defendant of fair trial; and (3) Sentencing Guidelines range for 43-year-old defendant mandating life imprisonment could not be departed downward to 20 years on basis that defendant would be 64 or 65 years old when he got out of prison.

Affirmed in part, vacated in part , and remanded.

1. Conspiracy 28(3)

Elements of drug conspiracy are existence of agreement to possess narcotics with intent to distribute, knowledge of agreement, and voluntary

participation in agreement, Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401 (a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

2. Conspiracy 44.2

Jury may infer conspiracy from circumstantial evidence and may rely upon presence and association, along with other evidence.

3. Conspiracy 46, 47(2)

Proof of overt act in furtherance of conspiracy is not required to prove conspiracy; common purpose and plan may be inferred from development and collection of circumstances.

4. Criminal Law

Aiding and abetting has three elements: defendant must have associated with criminal venture, participated in venture, and sought by action to make venture successful.

5. Conspiracy 28(3)

Five elements must be proven for conviction for conspiracy to launder money: there is conspiratorial agreement, one conspirator knowingly commits overt act by participating in financial transaction, financial transaction involves proceeds of unlawful activity, conspirator participating in transaction had intent to promote or further that unlawful activity, and transaction affected interstate or foreign commerce. 18 U.S.C.A. §§ 371M 1956(a)(1)(A)(i), (c).

6. Criminal Law 1144.13.(3)

When reviewing challenge to sufficiency of evidence to support conviction, appellate court must consider all evidence in light most favorable to guilty verdict and accept all reasonable inferences tending to support verdict.

7. Criminal Law 1159.2(7)

When reviewing challenge to sufficiency of evidence to support conviction, ultimate inquiry is whether rational trier of fact could have found guilt on each count beyond a reasonable doubt.

8. Conspiracy 47(3.1, 12)

Drugs and Narcotics 123.2

Evidence was sufficient to support convictions of five defendants for various offense, including possessions of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering; defendants transported packages to and from residences, met with people in parking lots or business establishments, and engaged in countersurveillance conduct, and residences associated with defendants contained cocaine, pistol, over $1 million cash, foreign wire transfer documents, scale, police pager, and drug ledgers. 18 U.S.C.A. §§ 2, 371, 1956(a)(1), (A)(i); comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401 (a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

9. Criminal Law 1158(4)

Trial court did not commit clear error in finding that defendant voluntarily consented to search of his apartments by police, despite defendant's testimony that he gave consent because he was afraid of police, who had told him that cocaine had been seized form person who had been seen earlier at defendant's apartment, where trial court did not see any overbearing conduct or anything of that sort by officer.

10. Criminal Law 1158(4)

Consent to search is fact issue, so trial court's determination that consent was voluntary will not be reversed absent clear error.

11. Searches and Seizures 197

Government has burden to prove consent to search by preponderance of the evidence.

12. Searches and Seizures

Court reviewing trial court's finding that consent to search was voluntary must take into account totality of the circumstances surrounding consent.

13. Criminal Law 730(5)

"Conspiracy bus" simile which prosecutor discussed during closing arguments, stating that defendant is guilty of conspiracy if he knows of others' criminal activity and does not take affirmative steps to "get off the bus," did not deprive defendant of fair trial in prosecution for possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to

commit money laundering, where court gave accurate explanation of conspiracy law, court instructed that arguments of counsel are not evidence, and evidence supported conviction. 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846; U.S.C.A. Const. Amend. 6.

14. Criminal Law 721(6)

Prosecutors statement during closing arguments, that defendants presented no credible evidence that any of them ever did any work, was not improper comment on defendant's failure to testify and did not deprive defendant of fair trial in prosecution for possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering, as reasonable jury would not interpret prosecutor's argument as comment on failure to testify. 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846; U.S.C.A. Const. Amend. 6.

15. Criminal Law 721(1)

Prosecution may not comment directly or indirectly on defendant's failure to testify.

16. 1171.1(3)

Misstatement of flaw by prosecutor during closing arguments can invalidate conviction.

17. Criminal Law 1171.1(2.1), 1171.5

When contemporaneous objection is made to prosecutor's alleged comment on defendant's failure to testify or to prosecutor's alleged misstatement of law, standard of review is whether defendant's substantial rights have been prejudiced.

18. Criminal Law 1171.1(2.1), 1171.5

In reviewing prosecutor's alleged comment on defendant's failure to testify

or prosecutor's alleged misstatement of law, Court of Appeals does not view prosecutor's comments in isolation but, rather, in context of entire trial.

19. Criminal Law 1171.1(2.1), 1171.5

In reviewing prosecutor's alleged comment on defendant's failure to testify or prosecutor's alleged misstatement of law, dispositive question is whether prosecutor's remarks cast serious doubt on correctness of jury's verdict.

20. Criminal Law 1154

Court of Appeals gives deference to district court's determination of whether closing arguments are prejudicial or inflammatory.

21. Criminal Law 721?????(1)

Although government may not comment directly or indirectly on defendant's failure to testify, government may comment on failure of defense, as opposed to defendant, to counter or explain evidence.

22. Criminal Law 772(5)

Trial court could give "deliberate ignorance" instruction in prosecution for possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering, where defendant lived in house from which more than $1 million in cash and 84 kilograms of cocaine were seized, defendant was seen entering and leaving house and was carrying key to house on day of seizure, and defense counsel made argument claiming lack of guilty knowledge. 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

23. Criminal Law 772(5)

"Deliberate ignorance" instruction is properly given only when facts support inference that defendant was subjectively aware of high probability of existence of illegal conduct, and he purposely contrived to avoid learning of illegal conduct.

24. Criminal Law 428, 444

Drug ledgers seized from house in which defendants were living and found in codefendant's automobile were admissible as co-conspirator statements in prosecution for conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering, despite contention that government did not prove who authored ledgers, where defendants lived in house where ledgers were found, and there was other evidence of defendants' involvement in cocaine conspiracy. Fed. Rules Evid. Rule 801(d)(2), 28 U.S.C.A.; 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

25. Criminal Law 1036.1(6)

Court of Appeals would review for plain error admission of drug ledgers to which defendants did not object. Fed. Rules Cr. Proc. Rule 52(b), 18 U.S.C.A.

26. Criminal Law 428

Identification of declaring is not always necessary for admission of coconspirator statement. Fed. Rules Evid. Rule 801(d)(2), 28 U.S.C.A.

27. Criminal Law 51
Drugs and Narcotics 133

Defendants could be sentenced on basis of being responsible for 59 kilograms of cocaine in prosecution for conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering, where calculations id drug ledgers seized from house in which defendants lived and from defendant's automobile included calculations for four cocaine transactions, adding up to 59 kilograms. U.S.S.G. §§ 1B1.3(a)(1)(B), 1B1.3, comment. (n.2), 18 U.S.C.A.App.; 2D1.4 (1992); 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

28. Criminal Law 1042

Defendant was not entitled to appellate relief respecting quantity determination as to cocaine for which she was responsible for sentencing purposes, respecting which she briefed on appeal, but did not object at sentencing, in prosecution for conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering. U.S.S.G. §§ 1B1.3(a)(1)(B), 1B1.3, comment. (n.2), 18 U.S.C.A.App.; § 2D1.4 (1992); 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

29. Criminal Law 1043(3)

Defendant could not make further challenge on appeal to quantity of cocaine attributed to him for sentencing purposes in prosecution for possession of cocaine with intent to distribute, conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering, where defendant's objection to quantity at sentencing was determined in his favor and defendant did not make further objection. U.S.S.G. §§ 1B1.3(a)(1)(B), 1B1.3, comment. (n.2), 18 U.S.C.A.App.; § 2D1.4 (1992); 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

30. Criminal Law 1244

When imposing sentence for drug offense, district court is not limited to consideration of quantity of drugs actually seized or charged, but may consider any amounts that were a part of common plan of distribution, if those larger amounts were reasonable foreseeable and were part of illegal activity that defendant joined. U.S.S.G. §§ 1B1.3(a)(1)(B), 1B1.3, comment. (n.2), 18 U.S.C.A.App.; § 2D1.4 (1992).

31. Criminal Law 1158

District court's factual finding concerning amount of drugs to be considered

in sentencing defendant will not be overturned absent clear error. U.S.S.G. §§ 1B1.3(a)(1)(B), 1B1.3, comment. (n.2), 18 U.S.C.A.App.; § 2D1.4 (1992).

32. Criminal Law 1158(1)

For sentencing purposes, district court's finding is not clearly erroneous as long as it is plausible in light of record as a whole.

33. Criminal Law 1251

Defendants' sentences could be enhanced for being organizer or leader and for being manager or supervisor, respectively, under Sentencing Guidelines in prosecution for conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering, where evidence was sufficient for trial judge to find that second defendant was manager or supervisor of two codefendants in drug distribution enterprise, and that first defendant was organizer or leader of overall operation. U.S.S.G. § 3B1.1(a, c), 18 U.S.C.A.App.; 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

34. Criminal Law

Defendant was not entitled to appellate relief on his contention, not raised through objection at sentencing, that district court erred in not considering downward sentencing adjustment based on defendant's "minor" or "minimal" role in cocaine distribution conspiracy, in prosecution for conspiracy to possess cocaine with intent to distribute, aiding and abetting possession of cocaine, and conspiracy to commit money laundering. U.S.S.G. § 3B1.2, 18 U.S.C.A.App.; 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

35. Criminal Law 1042

Questions of fact capable of resolution at sentencing can never constitute plain error.

36. Criminal Law 1158(1)

When proper objection is made, district court's finding of defendant's role in offense for sentencing purposes is reviewed for clear error. U.S.S.G. § 3B1.1(a, c), 3B1.2, 18 U.S.C.A.App.

37. Criminal Law 1042

District court did not commit plain error in increasing defendant's offense level by two levels for sentencing purposes because of presence of weapon during offense prosecution for possession of cocaine with intent to distribute, conspiracy to commit money laundering, where pistol was found near cocaine in house in which defendant had lived for none months, defendant was present at house on day cocaine and gun were seized, and defendant was found to be leader and organizer of cocaine operation. U.S.S.G. § 2D1.1(b)(1), 18 U.S.C.A.App.; 18 U.S.C.A. §§ 2, 371, 1956(a)(1)(A)(i); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

38. Criminal Law 1158(1)

Determination, to increase defendant's sentencing offense level because of presence of weapon during offense, is reviewed for clear error. U.S.S.G. § 2D1.1(b)(1), 18 U.S.C.A.App.

39. Criminal Law 1300

Sentencing Guidelines range for 43-year-old defendant mandating life imprisonment could not be departed downward to 20 years on basis that defendant would be 64 or 65 years old when he got out of prison, where defendant was not elderly and infirm at time of sentencing, but currently enjoyed generally good health and was neither under physician's care nor

taking any medication. U.S.S.G. §§ 5H1.1, p.s., 5K2.0, p.s., 18 U.S.C.A.App.; 18 U.S.C.A. § 3553(b).

40. Criminal Law 1147

Court of Appeals reviews degree or reasonableness of departure form Sentencing Guidelines sentencing range for abuse of discretion. U.S.S.G. §§ 5H1.1, p.s., 5K2.0, p.s., 18 U.S.C.A.App.; 18 U.S.C.A. § 3553(b).

41. Criminal Law 1139

Whether trial court's ground for departure from Sentencing Guidelines sentencing range is proper is question of law reviewable de novo because it involves interpretation of Guidelines. U.S.S.G. §§ 5H1.1, p.s., 5K2.0, p.s., 18 U.S.C.A.App.; 18 U.S.C.A. § 3553(b).

42. Criminal Law 1297

Character, family ties, family responsibilities, and community ties are improper grounds for departure form Sentencing Guidelines sentencing range. U.S.S.G. §§ 5H1.5, p.s., 5H1.6, p.s., 5H1.11, p.s., 18 U.S.C.A.App.

Wisting Fierro, pro se.

Olga Martinez, pro se.

Thomas J. Bevans, Houston, TX, for Ibanez

Jesus A. Serna, pro se.

Evelyn Graham Rodriquez, Houston, TX (Court-appointed), for Serna.

Richard B. Kuniansky, Houston, TX (Court-appointed), for Grajales.

Paula Offenhauser, Asst. U.S. Atty., Houston, TX, Ronald G. Woods, U.S. Atty., Houston, TX, for U.S.

Appeals form the United States District Court for the Southern District of

Texas.

Before REAVLEY, DeMOSS and STEWART, Circuit Judges.

DeMOSS, Circuit Judge:

This case began in November 1991 with an investigation by Houston police and IRS agents into a narcotics conspiracy involving approximately 178 kilograms of cocaine. The five defendant-appellants, Wisting Fierro, Olga Martinez, Jesus Serna, Jaime Ibanez and Jose Grajales, were charged in a January 8, 1992 superseding indictment with:

Count 1: conspiracy to possess cocaine with the intent to distribute, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846;

Count 2: aiding/abetting possession of cocaine, 18 U.S.C. § 2; and

Count 3: conspiracy to commit money laundering, 18 U.S.C. §§ 371, 1956(a)(1)(A)(i).

In addition, Grajales and Serna were each indicted on a substantive count of cocaine possession with the intent to distribute. On April 24, 1992, after a 11-day trial, the jury convicted all five defendants on all counts. The district court sentenced the defendants as follows: Graduals received 240 months each on Counts 1 and 2, and 60 months on Count 3. Serna received 188 months each on Counts 1 and 2, and 60 months on Count 3. Fierro received 293 months each on Counts 1 and 2, and 60 months on Count 3. Ibanez received 151 months each on Counts 1 and 2, and 120 months on Count 3. Martinez received 121 months each on Counts 1 and 2, and 60 months on Count 3. The judge ordered all terms of imprisonment to be served concurrently. Each defendant also received: (1) a &150 assessment of mandatory costs, and (2) two five-year terms of supervised release on Counts 1 and 2, and three years of supervised release on Count 3 (also to be served concurrently).

All five defendants have appealed their convictions and sentences, raising various ground for reversal. The government has brought a cross-appeal to challenge Grajales' sentence.

We affirm the convictions of all defendants on all counts, and we affirm the

sentences imposed on defendants Fierro, Martinez, Serna and Ibanez. We hold that the government's cross-appeal has merit, and we therefore vacate Grajales' sentence and remand his case for re-sentencing.

FACTUAL BACKGROUND

The facts and evidence relating particularly to each defendant are discussed at length later in this opinion, so our initial factual summary will be brief. On November 12, 1991 Houston police and IRS officers began surveillance of a house at 17026 French Road ("the French Road house") after they received information from a confidential informant. During a four-day period of surveillance ending November 16, 1991, Fierro, Martinez, Serna and Ibanez were observed (1) coming and going, sometimes carrying packages, bundles or bags, to and from the French Road house and an apartment at 8791 Hammerly ("the Hammerly apartment"); (2) driving to other locations in their vehicles; (3) making numerous phone calls on pay phones and mobile phones as well as answering pager calls; (4) meeting briefly with other unknown people in parking lots or at business establishments; and (5) engaging in "counter-surveillance"-type conduct that showed their suspicion that they were being watched. In addition, before and after meetings with the other defendants, Serna was seen going in and out of a third residence at 7831 Prestwood ("the Prestwood house" or "the stash house"). At about 3 p.m. on November 16, 1991, Serna arrived at the Prestwood house, stayed about 20 minutes and emerged with a weighted blue denim bag, which had been previously in Martinez' possession. After driving to a gas station to make a phone call, Serna drove to the rear of a warehouse on Harwin Street, took the blue denim bag into the brush and returned to his car without the bag. Officers immediately recovered the bag, which contained four kilograms of cocaine wrapped with tape and Spanish language newspaper. After leaving the warehouse area, Serna made and received a telephone call from a pay phone and then was apprehended. Fearing that Serna had alerted the others, officers began procedures to secure search warrants for the three residences. Just minutes after Serna had made his last phone call and was arrested, Grajales was seen arriving at the Prestwood house and attempting to leave three minutes later. Grajales was carrying a key to the Prestwood house, and Grajales' personal documents and photographs were found inside the house. A neighbor testified that Grajales had lived in the Prestwood house of nine months to a year. A subsequent search pursuant to warrant at the Prestwood house uncovered, among other items, 84 kilograms of cocaine (of similar purity to the 4

kilograms in the denim bag) found in the kitchen cabinets and garage; a 9mm semi-automatic pistol and two boxes of ammunition; a suitcase, bag and box stuffed with cash totaling $1,132,146; a digital scale; a pager; rolls of duct tape; a police radio scanner and an adding machine. Also found were several tally documents and adding machine tapes, indicating that the money had been counted and bundled by denomination with rubber bands.

Later in the evening of November 16, 1991, the French Road house was also searched pursuant to warrant. No drugs or large amounts of money were found there, but several "kilogram wrappings" made of tape and Spanish-language newspapers were found in the kitchen. The wrappings were similar to those around the kilograms found at the Prestwood house and in the bag abandoned of Serna. The search of the French Road house also uncovered several notebooks and documents identified as drug ledgers The Hammerly apartment and Ibanez' car were searched after Ibanez signed a consent form. A wallet and a small address book containing drug ledger information were seized form Ibanez's car. Fierro, Martinez and Ibanez were arrested at the apartment. Various items of evidence found at the three residences connected the defendants with each other and with the drug operation. Documents found in the French Road house revealed that thousands of dollars had been sent by wire transfer to Columbia, by or on behalf of the defendants. The money was sent in amounts of less than $10,000 at a time to avoid triggering a currency report to the Internal Revenue Service.

ISSUES

The five defendants raise various issues to challenge their convictions and sentences:
(1) Was the evidence sufficient to convict each defendant for (a) conspiracy to possess cocaine, (b) aiding and abetting cocaine possession, and (c) conspiracy to commit money laundering?

(2) Did Ibanez voluntarily consent to a search of his apartment and vehicle?

(3) Was the prosecutor's closing argument so improper that it raised doubt as to the correctness of the jury's verdict?

(4) Did the trial court err in instructing the jury on "deliberate ignorance?"

(5) Did the district court abuse its discretion in admitting certain "drug ledger" documents into evidence?

(6) Did the trial court clearly err in sentencing?

DISCUSSION

Sufficiency of the Evidence to Support Convictions

[1-5] The elements of a drug conspiracy are: (1) the existence of an agreement to possess narcotics with the intent to distribute, (2) knowledge of the agreement, and (3) voluntary participation in the agreement. United States v. Mergerson, 4 F.3d 337, 341 (5th Cir.1993), cert. denied, —U.S.—,114 S.Ct. 1310, 127 L.Ed.2d 660 (1994). The jury may infer a conspiracy form circumstantial evidence sand may rely upon presence and association, along with other evidence. Proof of an overt act in furtherance of the conspiracy is not required; a common purpose and plan may be inferred form a development and collection of circumstances. United States v. Robles-Pantoja, 887 F.2d 1250, 1254 (5th Cir.1989). Aiding and abetting has three elements: The defendant must have (1) associated with a criminal venture, (2) participated in the venture, and (3) sought by action to make the venture successful. Mergerson, 4 F.3d at 342. Five elements must be proven for a conviction for conspiracy to launder money: (1) there is a conspiratorial agreement, (2) one conspirator knowingly commits an overt act by participating in a financial transaction, (3) the financial transaction involves the proceeds of an unlawful activity, (4) the conspirator participating in the transaction had the intent to promote or further that unlawful activity, and (5) the transaction affected interstate or foreign commerce. United States v. Thomas, 12 F.3d 1350, 1360 (5th Cir.), cert. denied sub. nom. Sanchez v. United States, —U.S.—,114 S.Ct. 1861, 128 L.Ed2d 483 (1994); see also 18 U.S.C. § 1956(c).

[6,7] When reviewing a challenge to the sufficiency of the evidence to support a conviction, the appellate court must consider all evidence in the light most favorable to the guilty verdict and accept all reasonable inferences tending to support the verdict. The ultimate inquiry is whether a

rational tried of fact could have found guilt on each count beyond a reasonable doubt. United States v. Huntress 956 F.2d 1309, 1318 (5th Cir. 1992), cert. denied, ___ U.S. ____ ,113 S. Ct. 2330, 124 L.Ed.2d 243 (1993) (noting that juries "may use their common sense and evaluate the facts in light of their knowledge of the natural tendencies and inclinations of human beings.").

[8] The following evidence, summarized here in the light most favorable to the guilty verdict, supports the convictions of all defendants on all counts: Grajales: He possessed a key to the Prestwood stash house and lived there for at least nine months. He concealed his connection t the stash house by using a different address on his driver's license (the same address as Serna's driver's license). He was present at the stash house during surveillance on the same day the 80 plus kilograms of cocaine were seized from the stash house. He personal items were found inside the stash house. Grajales' fingerprints were on one of the money count documents found inside stash house, and the government argued that scribbled initials on the money count documents resemble Grajales' driver license signature. He hurriedly arrived and departed from the stash house just minutes after Serna threw away the 4 kilograms and made a phone call prior to his arrest. The timing of Serna's hone call and Grajales arrival at the stash house raises the inference that when Serna knew he had been caught he called the " big boss" to warn him. The government argued that Grajales was the overall leader of the drug operation, who maintained control over the cocaine and money by living at the stash house and keeping records of the operation.

Serna: He testified that he met Graduals only once or twice, but his driver's license bears the same address as Graduals' driver's license. Surveillance officers testified that Serene entered the stash house once on Nov. 14, three times on Nov. 15 (when he stayed inside the house for a whole afternoon) and twice on Nov. 16 (therefore was in the house when the cocaine and money were there and must have known of the drug operation). He admitted to (and was observed) carrying packages to and from the Priesthood, Hammerly and French Road residences. He was also seen meeting with people in business establishments and parking lots before and after trips to the Prestwood house. He showed guilty knowledge by engaging encounter-surveillance activity. He was observed carrying a weighted denim bag out of the stash house and abandoning it behind a warehouse after he realized that he was being followed. (The bag, which had been seen previously in Martinez's possession, contained four kilograms

of cocaine that was of similar purity to the cocaine seized from the stash house). Serna testified that he did not know Ibanez and met him on the day they both were arrested, but surveillance officers had observed that Serna knew and used the security assess code to enter the Hammerly apartment where Ibanez lived. Although Serna claimed that he didn't know Fierro before mid-November 1991, telephone records showed that Serna was paged 56 times from Fierro's mobile phone during October 1991. An address book found at the French Road house, where Fierro lived, has Serna's pager number listed next to the name "Gordo appears on several drug ledger documents found in the French Road house and in Ibanez's car. The government argued that Serna was the courier who reported directly to Grajales and had access to the large amounts of cocaine in the stash house.
Fierro: In the month prior to his arrest, he called Serna's pager 56 times on his mobile phone and made 843 other mobile phone calls that month. He lived at the French Road house with Martinez and Ibanez. His fingerprints were found on "kilogram wrappings" made of newspaper and tape seized from the French Road house.(The wrappings matched those around the cocaine found in the stash house and in the bag abandoned by Serna.) The utilities at the French Road house were in Fierro's name. He knew the access code to the Hammerly apartment and was seen driving to and from the French Road house and the apartment with Martinez, making phone calls, and meeting with other people. His fingerprints were found on documents identified as drug ledgers that were seized from the French Road house. He was born in the Colombian city which wire transfers of money were made. His fingerprints were found on documents associated with money laundering transactions and on an address book/drug ledger found in Ibanez's car. The government argued that Fierro was the organizer/leader of a cocaine distribution operation at the French Road house; he purchased cocaine from Grajales through Serna, and he used Ibanez and Martinez as counters to distance himself from the movement of the cocaine.
Ibanez: He is Fierro's nephew. He initially participated in leasing the French Road house, kept personal documents there and was often there with Fierro and Martinez. He generally lived in the Hammerly apartment that he had leased along with Fierro, although he used at least two other addresses to receive bills and mail. The address on his driver's license was the same as the address on Martinez's Texas ID card. The leasing documents signed by Ibanez for the French Road house and Hammerly apartment contained false information about his work history and the length of time he had been in the United States. The government alleged that Fierro wanted to leases in Ibanez had a student visa, was residing lawfully in the United States and had

references that could be verified. An address book/drug ledger apparently owned by Martinez was found in the glove compartment of Ibanez's car. Martinez's wallet, containing a receipt for the purchase of a .38-caliber revolver by Martinez, was also found in his car. Ibanez's fingerprints were found on a wire transfer document seized from the French Road house trash. He wire transferred more than $9,000 to a woman in Columbia who he claimed was his mother. He was seen carrying an object or objects cradled in a leather jacket into and out of the French Road house and Hammerly apartment, making phone calls and meeting briefly with various people in parking lots and apartments. The government argues that Ibanez was a courier for his uncle, Fierro, and that he was aware of the full scope of Fierro's operation.

Martinez: She was Fierro's girlfriend. She lived in the French Road house with Fierro and Ibanez. Her fingerprints were found in numerous places on the drug ledger documents seized from the French Road house. She participated in leasing the French Road house under a false name. Her address book (with her fingerprints on it) containing drug ledger information was found in Ibanez's car. She was seen in possession of the denim bag that Serna later used to carry the four kilograms of cocaine. She was seen accompanying Fierro and making trips to and from the French Road house and the Hammerly apartment, and meeting with other unknown people in parking lots. She had access to the Hammerly apartment along with Fierro. She was present in the car with Fierro when Fierro made numerous phone calls to Serna's pager. Her Colombian passport was found in the French Road house. Her Texas identification card born the same address as Ibanez's driver's license. Her fingerprints- and on at least one occasion, her name- were found on wire transfer documents found in the French Road house trash. She admitted to transferring $5,000 to a man she known less that a month. She purchased a .38-caliber revolver and the receipt was found in Ibanez' car. She claimed she later lost the gun. The government argued that Martinez was a subordinate to her boyfriend, Fierro, and was aware of his drug distribution operation and participated in keeping records of it. Based on the evidence as stated and keeping in mind the standard of review for review for sufficiency, we hold that the evidence was sufficient to support the jury's convictions of all five defendants on all counts.

Serna does not attract the sufficiency of the evidence to support his substantive drug conviction.

Whether Ibanez's Consent to Search was Voluntary

[9] Before trial, Ibanez moved to suppress all evidence seized during the November 16, 1991 search of the Hammerly apartment and Ibanez's Ford Escort, claiming that the consent he gave was not voluntary. No drugs were seized from the car or apartment, but two items found in the car were introduced at trial-a wallet and an address book with drug ledger information in it, both apparently belonging to Martinez. After holding a evidentiary hearing on the motion, finding that Ibanez's consent to search was voluntary.

[10-12] On the day in question, several police officers knocked on the door of Ibanez apartment and requested consent to search, stating that some kilograms of cocaine had been seized from a person who had been seen earlier at Ibanez's apartment. Ibanez signed a Spanish-language consent to search form. At the suppression hearing, Ibanez testified that he gave consent "first because I have nothing to hide," secondly because he was afraid of the officers. The officers did not explain to him that he had a right to refuse them entry. The court, in denying the motion, pointed to Ibanez testimony:

I think his consent was voluntarily given. He said it. Whether or not he had some apprehension or whether he was under some constrained.... I think anyone, any individual would be under some apprehension or stress in that regard .... I don't see any overbearing conduct or anything of that sort by the officer, so I'm going to deny the motion."

Consent is a fact issue, so the trial court's determination that consent was voluntary will not be reversed absent clear error. The government has the burden to prove consent by a preponderance of the evidence, United States v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990) (en banc), and the reviewing court must take into account the totality of the circumstances surrounding the consent United States v. Gonzalez-Basulto, 898 F.3d 1011, 1012-13 (5th Cir.1990); See also United States v. Olivier-Becerril, 861 F.2d 424, 426 (5th Cir.1988) noting six factors relevant to voluntariness); United States v. Sutton, 850 F.2d 1083, 1085 (5th Cir.1988) (noting that vouluntariness does not require giving of Miranda warnings or informing subject of right to refuse). We have reviewed the suppression hearing record, and we do not

find clear error in the trial court's finding that Ibanez voluntarily consented to the search.

Whether Prosecutor's Arguments Require Reversal

[13,14] Grajales complains that the prosecutor's closing arguments were so improper that they denied Grajales a fair trial. He contends that the prosecutor (1) improperly commented on Grajales' failure to testify by stating that "defendants present no credible evidence that any of them ever did any work," and (2) intentionally misstated the law of conspiracy by stating that a defendant is guilty of conspiracy if he knows of others' criminal activity and does not take affirmative steps to disassociate himself from that activity. Grajales' counsel objected to both arguments, but on each occasion the objection was overruled.

[15-17] The prosecution may not comment directly or indirectly on a defendant's failure to testify. United States v. Bright, 630 F.2d 804, 825 (5th Cir.1980). A misstatement of the law by the prosecutor during closing arguments can also invalidate a conviction. United States v. Mackey, 571 F.2d 376, 384 (7th Cir.1978). When a contemporaneous objection is made to such a comment, the standard of review is whether the defendants' substantial rights have been prejudiced. United States v. Granville, 716 F.2d 819, 821 (11th Cir.1983). Grajales argues that the "failure-to-testify" comment requires that he receive a new trial, and that the misstatement of conspiracy law requires reversal of his conviction, because it unconstitutionally shifted the burden of proof by telling the jury that the defendant had to come forward with evidence that the took affirmative steps to "get off the bus." Grajales contends that both improper arguments were aggravated by the trial court's overruling of objections, because this implied that the court approved of the argument.

[18-21] We do not view the prosecutor's comments in isolation, but rather in the context of the entire trail. United States. Young, 470 U.S. 1, 11, 105 C.Ct. 1038, 1044, 84 L.Ed.2d 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985). The dispositive question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict. United States v. Kelley, 981 F.2d 1464, 1473 (5th Cir.), cert. denied, - U.S. -, 113 S.Ct. 2427, 124 L.Ed.2d 647 (1993). We give deference to a district court's determination of whether closing arguments are prejudicial or inflammatory. United States v. Willis, 6 F.3d 257, 263 (5th Cir.1993). We had reviewed the

entire trial transcript, including the closing arguments, and we hold that the prosecutor's "conspiracy bus" simile, taken in context, did not cast serious doubt upon the correctness of the verdict because of (1) the court gave an accurate explanation of conspiracy law; (2) the court instructed that the arguments of counsel are not evidence;

> The context of this instruction makes it clear that the jurors understood that the court's version of the law is the version they must follow. After the prosecutor completed his main closing argument, the government objected to Grajales' counsel's description of conspiracy law. The following exchange took place:
> Prosecutor: "Judge, I'm going to object. That's an inaccurate statement of the law."
> The Court: "Overruled. Ladies and gentlemen of the jury, I will instruct you on what the law is. The layers will tell you what their interpretation is, and they may even argue what they think the facts are. But you are the fact finders, and I will give you the law at the end of the case."
> Counsel for Grajales: "It's obvious there is a disagreement on what the law is. But you will be instructed, as the judge told you... And we will wait and see who is right when the instructions are read to you tomorrow."

(3) the evidence of Grajales' guilt was sufficient to support his conviction. Regarding the alleged comment Grajales' failure to testify, we disagree that a reasonable try would interpret the argument as such. In addition, although the government may not comment directly or indirectly on the defendant's failure to testify, the government may comment on the failure of the defense, as opposed to the defendant, to counter explain the evidence. United States v. Soudan, 812 F.2d 920 (5th Cir. 1986) cert. denied, 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987). We hold that the prosecutor's comments did not prejudice Grajales' substantial rights or cast serious doubt upon the correctness of the verdict.

"Deliberate Ignorance" Instruction

[22,23] The court instructed the jury that:

> "The elements of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to you. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment

> would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may inferred form willful blindness to the existence of that fact."

Grajales points our that such an instruction is dangerous because it might allow the jury to convict a defendant who "should have known" of illegal conduct. A "deliberate ignorance" instruction is properly given only when "the facts support an inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct, and ... he purposely contrived to avoid learning of the illegal conduct." United States v. Breque, 964 F.2d 381, 388 (5th Cir.1992), cert. denied, —U.S.—, 113 S.Ct. 12553, 122 L.Ed.2d 652 (1993); see also United States v. Ojebode, 957 F.2d 1218, 1229 (5th Cir.1992) (stating that such an instruction "should rarely be given:), cert. denied, —U.S. —, 113 S.Ct 1291, 122 L.Ed.2d 683 (1993). Grajales claims that the instruction was improper on the facts of his case because "There was no question presented on whether [Grajales} closed his eyes to the obvious." The government argues that Grajales did not properly object at trial and that thus a plain error analysis is appropriate. In any case, we hold that the instruction was proper. The evidence shows that Grajales lived in the Prestwood house for at least nine months. N November 16, 1991 - the same day that more than $1 million in cash was seized form a bedroom of the Prestwood house, and 84 kilograms of cocaine were seized from the kitchen cabinets and garage of the Prestwood house -Grajales was seen entering and leaving he house and was carrying a key to the house. AT trail Grajales' counsel made the following argument:

> "Now, so what if this man had the keys to that house? Did that mean that's the only keys to this house? Did that mean he is the only person that has access to that house? Did that mean he now what was in the kitchen? Does that mean that he knew there was money in that suitcase locked up in another bedroom?"

We hold that such an argument claims a lack of guilty knowledge, and it clearly supports the deliberate ignorance instruction.

Admission of Drug Ledgers

[24] Fierro and Martinez challenge the trial court's admission into evidence of drug ledgers seized from the French Road house and the address book/ drug ledger found in Ibanez's car. The drug ledger documents were found under sofa cushions, on the coffee table and in the master bedroom closet at

the French Road house where Fierro and Martinez lived. A government expert testified that the calculations in the various ledgers were related to kilograms and prices per kilogram. The government did not introduce any testimony from a handwriting expert to determine the author of any of the drug ledgers, even though an IRS expert had examined the calculations in the ledgers along with court-ordered handwriting samples from all five defendants.

[25] Martinez did not object to the admission of any of the ledgers, and Fierro objected only the admission of the three ledgers found in the French Road house. Therefore, Martinez's challenge on appeal to the admission of all four ledgers—and Fierro's challenge to the admission of the ledger found in Ibanez's car—are reviewed today only of plain error. Se Fed. R. Crim. P 52(b); United States v. Olano, —— U.S.——,———, 113 S.Ct. 1770, 1777-8, 123 L.Ed.2d 508 (1993).

[26] Fierro and Martinez claim that the ledgers are hearsay and cannot be admitted as admissions or co-conspirator statements under Federal Rules of Evidence 801(d)(2) because the government did not prove who authored them. They also contend that the evidence doesn't not support the admission the drug ledgers as business records under Federal Rules of Evidence 803(6). However, identification of the declaring—such as the author of a drug ledger—is not always necessary for the admission of a co-conspirator statement. United States v. Breitkreutz, 977 F.2d 214, 218-20 (6th Cir.1992). In addition, there is other evidence connecting Martinez and Fierro with the ledgers, which also supporters their admissibility. United States v. Arce, 997 F.2d 1123, 1128 (5th Cir.1993). An FBI expert identified Martinez's fingerprints on 95 separate places on the ledger found on the coffee table ,and Fierro's prints were identified on 23 separate places on the coffee table ledger. On the address book/drug ledger found in Ibanez's car, the expert found Martinez's prints in five places and Fierro's prints in two places. Both Martinez and Fierro lived in the house where the ledgers were found, and there was other evidence of their involvement in the cocaine conspiracy, including Fierro's and Martinez's connections and activities

with the other defendants. We hold that the trial court's admission of the ledgers was not error.

Sentencing

A: Amount of Cocaine Involved in Conspiracy and Attribute to Each Defendant

[27-30] When imposing sentence for a drug offense, a district court is not limited to a consideration of the quantity of drugs actually seized or charged, but may consider any amounts that were part of a common plan of distribution, if those larger amounts were reasonably foreseeable and were part of the illegal activity the defendant joined. United States v. Smith, 13 F.3d 860, 864-65 (5th Cir.1994), cert. denied, —U.S.—, 114 S.Ct. 2151, 128 L.Ed.2d 877 (1994). At sentencing, the trial court found that the overall conspiracy involved more than 178 kilograms of cocaine. This total took into account the 84 kilograms of cocaine found in the Prestwood house, the four kilograms of cocaine in the denim bag abandoned by Serna, and , an additional 990 kilograms represented by the $1.1 million in cash found at the Prestwood house. In accordance with the Sentencing Guidelines,

> U.S.S.G. § 2D1.4; U.S.S.G. § 1B1.3(a)(1)(B) & note 2 ("With respect to offenses involving contraband. (Including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.")

the trial court found that Fierro, Martinez and Ibanez were each accountable for 59 kilograms of cocaine, Serna was found accountable for 88 kilograms, an Grajales was found accountable for the full 178 kilograms. Fierro and Ibanez challenge the trial court's determinations of the amount of cocaine attributable to them.

Grajales' brief does not challenge the quantity of cocaine attributed to him. Martinez challenges quantity in her brief, but she did not object to the quantity determination at sentencing; therefore she is not entitled to appellate relief. See United States v. Guerro, 5 F.3d 868, 871 (5th Cir.1993) (holding that "questions of fact capable of resolution by the district court

upon proper objection at sentencing can never constitute plain error."), cert. denied—U.S.—,114 S.Ct. 111, 127 L.Ed.2d 422 (1994).

> Similarly, we do not address Serna's challenge to the 88 kilograms of cocaine attributed to him, because he did not preserve this argument before the trial court below. Serna objected at sentencing only to the PSI's determination that he was responsible for the entire 178 kilograms (representing the money seized at the Prestwood house as well as the 88 kilograms seized). In his objections to the presentence report, Serna stated: "Defendant asserts that his guideline computation should be based on 87 kilograms and requests a hearing to resolve this matter." At the sentencing hearing, Serna's counsel reiterated this position, stating that "we would feel that [base offense] level 36 is the proper level, that the cocaine should be at that level 36, not a level 38." See U.S.S.G. § 2D1.1(c)(4) (Drug Quantity Table, showing a base offense level of 36 corresponding to a finding that 50 to 150 kilograms of cocaine were involved in the offense); compare § 2d1.1(c)(3) (a finding of 178 kilograms would have mandated a base offense level of 38).
>
> The court sustained Serna's objection, finding that Serna was connected only to the cocaine seized at the Prestwood house, not with the money. In accordance with the court's ruling, the final judgment entered against Serna reflects an offense level. Because Serna's objection to quantity at sentencing was determined in his favor and he did not make a further challenge to the quantity of cocaine attributed to him at sentencing. Guerrero, 5 F.3d at 871.

[31,32] A district court's factual finding concerning the amount of drugs to be considered in sentencing a defendant will not be overturned absent clear error. United States v. Rivera, 898 F.2d 442 (5th Cir.1990). A finding is not clearly erroneous as long as it is plausible in the light of the record as a whole. United States v. Shipely, 963 F.2d 56, 58 (5th Cir.), cert. denied, —U.S.—, 113 S.Ct. 348, 121 L.Ed. 2d 263 (1992). With regard to Fierro and Ibanez, the district court came up with 59 kilograms by adding together the figures contained in the drug ledgers seized from the French Road house and Ibanez's car. The government's expert witness testified that calculations in the ledgers included four cocaine transactions: one for eight kilograms, one for nine kilograms, one for 12 kilograms and one for 30 kilograms. We have examined the record, and we do not find clear error in the trial court's finding that Fierro and Ibanez may be sentenced on the basis of 59

kilograms.

> "Ibanez also claims that a remand for re-sentencing is required because the trial court did not comply with Federal Rules of Criminal Procedure 32(c)(3)(D) by making explicit factual findings on each contested statement in his presentence report. We have reviewed the sentencing transcripts, and we hold that he court complied with Rule 32. See United States v. Carreaon, 11 F.3d 1225, 1230-31 & n. 17 (5th Cir.1994) (noting that the district court is not required to "regurgitate" the facts to satisfy Rule 32 concerns)."

B: Upward and Downward Adjustments for Roles in the Conspiracy

[33-35] Grajales claims the trial court improperly enhanced his offense level by four levels upon finding that he was an "organizer or leader" under U.S.S.G. § 3B1.1(a). Fierro claims that the trial court improperly enhanced his offense level by two levels upon finding that he was a "manager or supervisor" under U.S.S.G. § 3B1.1(c). Serna, although he did not object on this ground at sentencing, claims that the district court erred in not considering a downward adjustment of two to four levels based on his "minor" or minimal" role in the conspiracy. U.S.S.G. § 3B1.2. Again, Serna is not entitled to appellate relief on this point, because questions of fact capable of resolution at sentencing can never constitute plain error. United States v. Guerro, 5F.ed 868, 871 (5th Cir.1993), cert. denied, —U.S.—, 114 S.Ct. 1111, 127 L.Ed.2d 422 (1994).

> "Serna also argues that his attorney was ineffective at sentencing by failing to argue for a offense level reduction under § 3B1.2. Serna points to the trial court's statement that Serna should be sentenced "at the lower end of the guidelines because in my opinion, he was a courier whose responsibility it was to assist in the distribution." Serna says his trial counsel's failure to move for the level decrease, given these facts, was unreasonable. However, we have held that ineffective assistance claims cannot be resolved on direct appeal unless adequately raised in the district court. United States v. McCaskey, 9 F.3d 368, 380 (5th Cir. 1993), cert. denied, —U.S.—114 S.Ct 1565, 128 L.Ed.2d 211 (1994). We hold that the record in this case is not sufficiently developed with respect to the ineffective assistance claim to

justify an exception to the general rule of non-review. See United States v. Bermea, 30 D.3d 1539, 1573 & n. 4 (5th Cir.1994). Serna remains free to pursue his claim of ineffective assistance in accordance with 28 U.S.C. § 2255."

[36] When proper objection is made, a district court's finding of a defendant's role in the offense is reviewed for clear error. United States v. Behley, 973 F.2d 396, 401 (5th Cir.1992). AS we discussed above, the evidence introduced at trial was sufficient for the trial judge to find that Fierro was a manager or supervisor of Ibanez and Martinez in the drug distribution enterprise, and that Grajales was the organizer or leader of the overall operation. We have reviewed the evidence against Fierro and Grajales, and we hold that the trial court did not clearly err in making the upward adjustments due to their supervisory roles in the offense.

C: Presence of a Weapon

[37,38] Grajales challenges the increase of his offense level by two levels because of the presence of a weapon during the offense, pursuant to U.S.S.G. § 2D1.1(b)(1). This determination is also reviewed for clear error. United States v. Menesses, 962 F.2d 420, 428 (5th Cir.1992). The evidence shows that a 9mm pistol was found in a kitchen cabinet of the Prestwood house "three or four feet" from a stack of cocaine." Grajales possessed a key to the house , had lived there for nine months and was present at the house on the day the cocaine and gun were seized. He was found to be the leader/organizer of the operation who was in charge of the cocaine and the money. There was no clear error in the § 2D1.1.(b)(1) adjustment. United States v. Webster, 960 F.2d 1301-11 (5th Cir.) (gun in kitchen cabinet), cert, denied sub. nom. Nelson v. United States, —U.S.—, 112, S.Ct. 355, 121 L.Ed.2d 269 (1992); United States v. Villarreal, 920 F.2d 1218, 1221 (5th Cir.1991) (handgun in kitchen drawer near where cocaine was stored).

Cross-Appeal-Downward Departure of Grajales

[39] Grajales' total offense level 44 mandates a guideline range of life imprisonment. U.S.S.G. Chapter 5, Part A (Sentencing Table). However, the trial court departed downward and sentenced Grajales to 240 months, stating that it believed a 20-year-old Grajales would be 64 or 65 when he got out of prison. The trial court stated that, when the defendant is in his forties, "20 years is life as far as I'm concerned."

[40,41] A district court cannot depart from the guideline range unless identifies "an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing commission" in formulating the guidelines. 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0.

> "The government and Grajales disagree on the proper standard of review for a trial court's departure form the sentencing range. We review the degree or reasonableness of a departure for abuse of discretion. However, whether the ground for departure is proper is a question of law reviewable de novo because it involves an interpretation of the Sentencing Guidelines. United States v Wilder, 15 F.3d 1292, 1300 (5th Cir.1994); United States v. White, 945 F.2d 100, 101 (5th Cir.1991)."

Under U.S.S.G. § 5H1.1, a defendant's age is an improper basis for departure unless the defendant is elderly and infirm" at the time of sentencing. Grajales' presentence report, however, states that "he currently enjoys generally good health and is neither under a doctor's care nor taking any medication."

[42] The district court's comments at sentencing indicate that the departure may also have been motivated by letters form Grajales' family and from government officials, describing Grajales' character. However, character, family ties, family responsibilities and community ties are also improper grounds for departure. U.S.S.G. §§5H1.5, 5H1.6, 5H1.11, United States v. O'Brien, 950 F.2d 969 (5th Cir.1991), cert. denied, —U.S.—, 113 S.Ct. 64, 121 L.Ed.2d 31 91992); United States v. Branch, 873 F.2d 765, 768 (5th Cir.1989).

For these reasons, we hold that downward departure for Grajales was improper, and we vacate Grajales' sentence and remand his case for re-sentencing within the guideline range.

Conclusion

Therefore, for the reasons stated in this opinion, we AFFIRM the convictions of al defendants on all counts. We AFFIRM the sentences of

defendants Fierro, Martinez, Serna and Ibanez. We VACATE the sentence of Grajales because of the trial court's improper downward departure and REMAND his case for re-sentencing.

APPENDIX B

Don Stricklin
ATTORNEY'S BUILDING
First Assistant

77002-1901

DISTRICT

201 Fannin, Suite 200
Houston, Texas

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

March 10, 1993

O. Ivan White,
Federal Correctional Institution
P.O. Box 9500
Texarkana, Texas 75501

Attn.: Richard J. Goodsell
Inmate Systems Manager

Re: Wisting R. Fierro aka Bobby Lebrons Miranda
Federal Register No. 59534-079-G
Harris County Cause Nos. 8835401 and 88355400

Dear Mr. Goodsell:

This office is in receipt of the above referenced defendant's request for disposition of his case. The court has dismissed this case and the detained

will be removed by the Harris County Sheriff's Office.

Thank you for your cooperation in this matter. Should you need additional information, please do not hesitate to contact my office at 713-755-75814.

Sincerely,

[redacted]

Don R. Stricklin
First Assistant District Attorney
Harris County, Texas

THE STATE OF TEXAS
v.s.
BOBBY LEBRONS MIRANDA

CAUSE NO. 6667
OFFENSE Aggravated Poss. of Cocaine
in the 344th DISTRICT COURT OF CHAMBERS COUNTY, TEXAS
December Term A.D. 19_____

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and through her District Attorney, and respectfully request the Court to dismiss the above entitled and numbered criminal action for the following reason:
The Defendant was convicted in another cause of court.
In custody elsewhere.
Old case, no arrest.
Missing Witness.
Request of complaining witness.
Motion to suppress granted.

Co-Defendant tried, this Defendant testified.
Insufficient evidence.
Co-Defendant convicted, insufficient evidence this Defendant.
case refiled
Other

EXPLANATION:

This case is almost five (5) years old, possible speedy trial problem, and defendant is incarcerated in Federal prison until approximately the year 2013 and not eligible for parole, as per Federal authorities.

WHEREFORE, PREMISES CONSIDERED, it is requested that the above entitled and numbered cause be dismissed.

Respectfully submitted

_____
Assistant District Attorney
Chambers County, Texas

ORDER

The foregoing motion having been presented to me on this _____ day of _____
A.D. 19_____ and the same having been considered, it is, therefore, ORDERED ADJUDGED and DEGREED that said above entitled and numbered cause be and the same is hereby dismissed.

_____
JUDGE PRESIDING

DEFENDANT WISTING R. FIERRO Judgment-
Page_____of _____
Case Number: H-91-00211-s-03

APPENDIX C

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level:_____
Criminal History Category:_____
Imprisonment Range:_____ to _____ months
Supervised Release Range: Cts. 1 & 2: 5 to 5 years
ct. 3: 2 to 3 years
Fine Range: $ 25,00 TO $4,000,000
Fine is waived or is below the guideline range, because of the defendant's inability to pay.
Restitution: $_____
Full restitution is not ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s).: the defendant has several outstanding criminal cases and it the cases had been brought to conclusions, the defendant very possible would have been found guilty as there is sufficient evidence by preponderance.

OR

The sentence departs from the guideline range

upon motion of the government, as a result of defendant's substantial assistance.

for the following reason(s):

approved as the form

1. BY Mr. Casing
2. Q Gus Patton was on surveillance at the Hammerly apartments,
3. is that correct?
4. A yes
5. A Okay. What else was observed there.
6. A Once Mr. Serna arrived at that location, it appeared to Mr. —
7. Officer Patton, that everybody was very attentive to him, and if
8. he had to pass judgment on who was the boss of their little click
9. out there, it was his opinion that Mr. Serna was. They all went
10. into the apartment there, Number 245, everyone that was in the
11. apartment — I'm sorry, that was in the parking lot that was in-
12. volved in the counter-surveillance and Mr. Serna. Officer Patton
13. also observed —
14. MR. SPEAKER 4: This is Serna, Fiero, Martinez, Ibanez?
15. THE WITNESS: Yes, and then one other person.
16. BY MR. CASING:
17. A And Officer Patton also observed that Mr. Serna did carry a
18. package in with him.
19. Q Okay. What else was observed there?
20. A Mr. Serna ultimately left the apartment. Shortly after his
21. departure, Mr. Ibanez left the apartment also, and Mr. Ibanez
22. was carrying a package.
23. Q Was surveillance set up at that time to follow the people as
24. they left the Hammerly apartment?
25. A Some of them.

A That was his opinion, and I can only tell you what he told me.
Q Okay. He didn't write anything specific to you about what Mr. Ibanez did when he walked downstairs.
A It just talked about all the suspects in general.
Q Sort of lumped them all together?
A Yes, sir.
Q And then you say Mr. Serna arrives after these other people were already in the parking lot?
A That is correct?
Q Did Mr. Serna ever go up into the apartment?
A According to Officer Patton, yes, sir, he did.
Q And you say he was carrying some type of bag.
A According to Officer Patton, yes.
Q What took place in the parking lot that gave some impression that Serna was the boss of these people?
A Just Officer Patton's opinion. The way that the people were very attentive to him. It's just a feeling that he had in watching their activities.
Q Okay. How long was Mr. Serna inside of the apartment?
A He arrived at 6:14. And he departed fourteen minutes later at 6:28.
Q And when Mr. Serna went into the apartment, Fierro and Martinez were there, as well as Mr. Ibanez?
A Correct.
Q So you don't know who Mr. Serna talked to while he was in the

EXHIBIT No. D

United States Court of Appeals
Fifth Circuit
Office of the Clerk

December 9, 1994

Mr. Wisting Fierro Ruiz
#59534-079
Unit Beau 2
P.O. Box 5000
Oakdale, LA 71463

No. 92-2370 USA v. Wisting R. Fierro & Olga L. Martinez

(DC# CR-H-91-211-3)

Dear Sir:

Your letter of December 1, 1994 and petition for panel rehearing filed in response to this Court's letter of November 28, 1994 was received on December 5, 1994.

Please be advised that your petition for panel rehearing has been filed, however, the petition cannot be submitted to the Court for disposition since it is not in compliance with Rule 40(b) of the Federal Rules of Appellate Procedure in that the petition may not exceed 15 pages in length. Accordingly, before your petition can be submitted to the Court it will be necessary for you to either prepare and forward a petition for rehearing in compliance with the rule, or, file a motion for leave to file the petition for panel rehearing in excess of the page limitation required by the rule.

Your petition for panel rehearing in compliance with the rule, or, the necessary motion for leave to file in excess pages must be filed within 14 days from this date, or, by not later than December 23, 1994.

Very truly yours,
CHARLES R. FULBRUGE III, Clerk
By_____
MaryBeth Kenney
Case Manager

MBK:lmc
cc: Ms. Olga Martinez
Ms. Paula C. Offenhauser

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-2370

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

versus

WISTING R. FIERRO,
OLGA L. MARTINEZ,
JAIME IBANEZ a/k/a IBANIA, and
JESUS A. SERNA,
Defendants-Appellants,
JOSE J. GRAJALES,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the
Southern District of Texas

ORDER:
IT IS ORDERED that the motion of appellants, Olga L. Martinez and Wisting R. Fierro, for leave to file petition for rehearing out of time is DENIED.

/s/ Harold R. DeMoss, Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-2370
USDC No. CR-H-91-211-3

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

versus

WISTING R. FIERRO,

OLGA L. MARTINEZ,
JAIME IBANEZ a/k/a IBANIA, and
JESUS A. SERNA,
Defendants-Appellants,
JOSE J. GRAJALES,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the
Southern District of Texas

ORDER:
IT IS ORDERED that the motion by William R. Rapp to withdraw as retained counsel for Wisting R. Fierro and Olga L. Martinez is GRANTED.

This Court construes Fierro and Martinez's supplemental pro se brief received by this Court on December 2, 1993, as a request to add an addendum to the already-filed pro se supplemental brief. IT IS ORDERED that the request is GRANTED and that the addendum be added to their supplemental brief.

To the extent that Fierro and Martinez move to file a second supplemental pre se brief in case No. 92-2370, IT IS ORDERED that the motion is DENIED. Further supplemental briefing in case No. 92-2370 will not be permitted unless directed by this Court.

To the extent that Fierro moves to file a pre se brief in his civil appeal of the district court's order denying Fierro's motion styled "letter motion to mandamus and motion to dismiss case," IT IS ORDERED that the motion is DENIED without prejudice to filing the motion under the correct case number, No. 93-2880.

UNITED STATES CIRCUIT JUDGE

APPENDIX F

WISTING FIERRO RUIZ
REG # 59534-079
UNIT BEAU 2
P.O. BOX 5000
OAKDALE, LA. 71463.

Date: December 12, 1993

MR.
WILLIAM J. RAPP
AT LAW
600 AMERICAN BUILDING 30 E. Central Parkway
CINCINNATI, OHIO 45202

Dear Mr. Rapp.

Thank for your letter December 7, 1993 acknowledge I have bee received and respectfully I answer your letter.

On October 13, 1992 I send you, to Mr. Kevin Schad and Mr. Robinson, some points in which I disagree of some content of the Brief Appeal that your submitted to the Court Appeal of absence of support in the record. For example;

(1) The draft in Page 14 said that "That Fierro using his mobile phone made numerous calls to Serna" it is erred and contrary record. See T. 7: 50. I had acquiescence in permitting the use of the phone for other person, I never called to Serna nor I know him. Acquiescence is different to made personally numerous calls.

(2) The Page 16 said "Each of the five defendants' provided eight pages of handwriting for comparison" The record showing that I provide 18 pages of Handwriting under the expert direction able to comparison.

(3) Page 23 said "Only a few of the calculations were dated" the record found that the disorganized paper of French road were no dated and that the dated were from Prestwood.

On October 14, 1993 you express his concern in letter that "Don't believed any of the issues raised therein will be favorably ruled by the Court Appeal", it express that you not put attention to may violations that was occurs and that I raised in the Prose as: (1) Violation of Rule 16 (a)(1)(c) because the prosecutor never made discovery of handwriting samples contrary to the Court order on the 1/21/92 that obligated to the discovery not the prosecutor made disclose under the request of the defense and denied in prosecutorial misconduct it possibility. (2) The absence of James requirements under the Rule 801 (d)(2)(E) in the admission of the bunches' hearsay statement supported not for preponderance of other evidence, with violation of confrontation clause and absent totally of find from the Court. (3) The violation of the Rule 15 when absent of guarantees reliability from the expert and absent of motion under the Rule 15 the prosecutor used deposition of the expert testimony without of trustworthiness believed. (4) The prejudicial used of the jewelry in the trial, with violation confrontation clause and violation of 4th amendment for the absence of the requisite of probable cause and absent of magistrate authorization, with the prejudiced that I am deprived of the Fifth amendment for the absence of "just compensation" as owner. i.e..

Mr. Rapp. You never respond to me request an as in the Appeal Brief the statement of facts does not argument nothing under Jewelry, absence of discovery, deposition prosecutorial, violation Rule 48 (a), i.e.. I consider that at have been authorized the Prose I can file the statement of fact that you not considered.

Note that my statement of facts is supported by the record. Remember that I submitted to you the Prose brief awaiting his preparation in questions presented and table of authorities. Your submitted the brief absent of it facts and I an a layman at law not aware of it, but in research showed that some Circuit federals are reluctant to consider Brief absents of statement of facts, table authorities and questions presented.

In other words. What questions presented will be able the Appeal Court to answer to me supplemental Brief?

Clearly I writing to you at this time under my decision. I don't desires you withdraw not I authorized to you made because can be contrary to public

interest, but if his decision is withdraw please sent to me the money paid so that I can be able to seeking other Lawyer or analyzed if can proceed Prose entirely.

Please submit the statement of facts to the Appeal Court and the questions presented together with table of authorities, you can be able to change the laymant special request and some other duty that different to the statement of facts your saw incorrect.

In the other hand remember that on August 1991 before my sentence, we submitted an a motion to sustain and evitate the dismiss of the First Appeal, which your never have said some event in this matter, the Appeal was one different to the currently remember that relate to violation Pretrial and Trial like the intent of forfeiture As your has not communicate about this Appeal or his stage actual I send one Prose together with motion denied to me from the Judge in which I solicited mandamus Action to the paid of the jewelry's and the reimbursed of the transcripts money. Let me know about of this requirement of the First appeal under which I have long time ago sending matter to you.

I only need claim my right and his duty is helped in the issue or correctness some error, Is indicate to you that not authorizer be removed or substituted as counsel and his motion to withdraw is without of my consent but it is his duty to present in my behalf all not frivolous claim and I must that you file immediately the statement of facts of my Prose supplemental.

I waiting excuse from you if some troubled had for my actions but was not intention seeking difficult or irritate his moment, my only intention is called the attention in the Court under my not frivolous claim.

Whether you have some questions to me can contacted.

Respectfully and sincerely

_____

WISTING FIERRO RUIZ

C.C. Olga Martinez
5th Cir. Clerk of Court

APPENDIX G

WISTING FIERRO RUIZ
REG # 59534-079
UNIT BEAU 2
P.O. BOX 5000
OAKDALE,LA. 71463

Date: December 1, 1994

MR. CHARLES R. FULBRUGGE III
CLERK
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
6000 CAMP STREET
NEW ORLEANS, LA 70130

RE: 92-2370- U.S. V. FIERRO Et. al

ATTN: CINDY M. BROADHEAD-Deputy Clerk

Dear Madam:

Please in behalf of the appellants' Fierro and Martinez file this Brief petition for rehearing by the panel. According at his instructions I am submitting the conclusions, the signature in the certificate of service and has made clarity that wish to be heard by the rehearing b the panel through of this petition.

Opposing counsel has been served and appellants' has attached in the Brief an authorization from Miss. Martinez adopting the Appellant Prose Brief. These issues here presented were without panel attention. Exhibits records are attached.

Whether you has any comments or instructions please don't hesitate contact the proses appellants'. Are submitted one original Brief and three copies.

Respectfully Submitted,

WISTING FIERRO RUIZ

c.c A.U.S.A. PAULA OFFENSHAHUER
Miss OLGA L. MARTINEZ

Delivered to Inmate 1/5/95 at 3:30 p.m.

Jackie Carrier
Beauiregara Unit

Secretary
SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

APPENDIX H

January 18, 1995

Wisting F. Ruiz
#59534-079 Unit Beau 2
P.O. Box 5000
Oakdale, LA 71463

RE: Ruiz v. United States

Petitioner: Wisting F. Ruiz

In reply to your letter or submission, received January 18, 1995, I regret to inform you that the Court is unable to assist you in the matter you present.

Under Article III of the Constitution, the jurisdiction of this Court extends only to the consideration of cases or controversies properly brought before it from lower courts in accordance with federal law and filed pursuant to the Rules of this Court.

Your papers are herewith returned.

Sincerely,
William K. Suter, Clerk
By:

Sandra Elliott Spagnold
(202) 479-3025

Enclosures